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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 237

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*, *Petitioners,*

vs.

SWITCHMEN'S UNION OF NORTH AMERICA, *et al.*, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I.

RESPONDENTS' INTERPRETATION OF THE DECISION BELOW IS WHOLLY ERRONEOUS.

In order to avoid the questions presented by this petition for certiorari, respondents contend (Resp. Br., pp. 14-16) that the court below found to be "clearly erroneous" the District Court's Finding 11 that respondents' conduct and constitution raise "serious, substantial, difficult, and doubtful questions going to the merits of this case" (S.A. 167-168. The court below did nothing of the kind. To the contrary, the court labored mightily to avoid that precise question (App. A, pp. 48-50).

The District Court made alternative findings—10 and 11—in support of the relief it granted. Finding 10 (S.A. 167) was that respondents had in fact failed to bargain in good faith. It was on the basis of this finding that the District Court concluded that the respondents had failed, as a matter of law, to carry out the minimum requirements of the duty to negotiate imposed upon them by the Railway Labor Act (S.A. 173), and it was this finding which the court below held to be "clearly erroneous" on the basis of the preliminary record then before it (App. A, p. 49).*

When it came to Finding 11, however, the court below did not hold that finding to be "clearly erroneous". The court specifically rejected *petitioners'* contention that, in order to reverse, it must determine that Finding 11 was clearly erroneous (App. A, pp. 48-49), and instead, reverted to its conclusion that to authorize a preliminary injunction to preserve the status quo in a suit to enforce the Railway Labor Act, the Norris-La Guardia Act required immediate proof of a "clear case" of failure to comply with the Railway Labor Act (App. A, p. 41). The court below concluded that injunctive relief was precluded by its determination that the record then before it did not show such a clear violation (App. A, p. 49). It reemphasized this position by stating that where the party resisting a preliminary injunction raises the Norris-La Guardia Act as a defense, ". . . plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendants here had done that" (App. A, p. 49).

The propriety of this standard for preliminary relief preserving the status quo in actions to enforce the man-

* This determination was a clear abuse of the Court of Appeals' authority (Pet., pp. 24-27 and pp. 8, 9, *supra*).

datory obligations imposed by the Railway Labor Act is one of the principal issues for which review is sought (Pet., pp. 2, 11-16). Respondents' contention that this question is not presented in this case is not only in error, it is an insult to the intelligence of the court below. If Finding 11 were "clearly erroneous," the injunction issued would be improper under any standard, and the court below would never have found it necessary to engage in an extended discussion of a special standard for reviewing the issuance of preliminary injunctions under the Norris-La Guardia Act (App. A, pp. 49-50).

The court below found Finding 11 to be, not "clearly erroneous," but legally insufficient in this kind of case. In this its decision was both wrong and in conflict with decisions of other circuits. This Court should review this question of law.

II.

RESPONDENTS' CONCEPTION OF THE RELATIONSHIP BETWEEN THE RAILWAY LABOR ACT AND THE NORRIS-LA GUARDIA ACT IS WHOLLY ERRONEOUS.

Respondents do not really attempt to justify the strict standard imposed by the court below on the granting of a preliminary injunction to preserve the status quo in an action to enforce the Railway Labor Act. The real thrust of their argument (Resp. Br., pp. 16-22) is that § 4 of the Norris-La Guardia Act bars any temporary injunction against a strike, and that § 7 bars any temporary injunction at all in a labor dispute except in strict conformity with the terms of that section (Resp. Br., pp. 17-19).

This Court's decision in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U.S. 30, is a complete answer to respondents' § 4 argument. Obviously, in a proper case, a strike may be enjoined.

As the court below noted (App. A, p. 50, n. 8), respondents' § 7 argument is "scarcely reconcilable with the *Virginian*, *Graham* and *Howard* cases." Respondents' argument reflects a complete misunderstanding of the relationship between the Acts in question. As this Court said in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774, and repeated in the *Chicago River* case, 353 U.S. 30, 42, where injunctive orders are issued to enforce compliance with the Railway Labor Act, they are issued "notwithstanding the provisions of the Norris-La Guardia Act," and not because it is somehow possible to reconcile that relief with the terms of the Norris-La Guardia Act. Where the effect of an injunction is to proscribe a threatened violation of an explicit command of the Railway Labor Act, the Norris-La Guardia Act's prohibitions simply are not applicable. *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3d Cir., 1955).

The standard imposed by the court below as a test for granting preliminary relief to preserve the status quo in a case to enforce compliance with the Railway Labor Act is no more defensible than respondents' assertion that the Norris-La Guardia Act bars any such relief.

Under the decision below, where an action is brought to enforce compliance with the Railway Labor Act, the mere *claim* that the relief sought is barred by the Norris-La Guardia Act is deemed sufficient to preclude preliminary relief to preserve the status quo, unless proof is immediately made which would justify final and permanent relief. There is no justification for such an exception to the ordinary standards under which a preliminary injunction may issue. Under the decisions of this Court, the question

of the applicability of the Norris-La Guardia Act in such a case depends upon whether or not the Railway Labor Act has been violated. If the Railway Labor Act has been violated, the Norris-La Guardia Act does not apply; if the Railway Labor Act has not been violated, it does. And until the issues raised by the complaint have been settled, it cannot be determined whether or not the Norris-La Guardia Act applies. Since, as this Court has held, the purpose and policy of *both* acts must be preserved, there is no reason why a claim based on one act should be given preference over a claim based on the other. The mere invocation of one statute should not preclude the preservation of the status quo to permit orderly consideration of the merits of a serious and substantial claim based on another.

III.

RESPONDENTS' ATTEMPT TO DISTINGUISH THE DECISIONS OF THE THIRD AND EIGHTH CIRCUITS IS WITHOUT MERIT.

In *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226, and *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 182 F. 2d 996, the Courts of Appeals for the Third and Eighth Circuits, respectively, held that the ordinary standards governing preliminary injunctive relief to preserve the status quo apply to actions brought to enforce the Railway Labor Act, even though the relief sought was claimed to violate the Norris-La Guardia Act. In this case, the court below held that those standards did not apply (App. A, p. 49). In the *Railroad Yardmasters* case, the court held that "the raising of substantial and serious doubts" was sufficient to justify a temporary injunction, notwithstanding the Norris-La Guardia Act; the court below said it was not. In the *Missouri-Kansas-Texas* case, the court said that such relief did not involve the merits

of the controversy; the court below said the merits must be finally resolved as a prerequisite to such relief. These decisions are in conflict with the decision below, and specious attempts to distinguish the cases (Resp. Br., p. 22) cannot change that fact.

The fact that one case involved an injunction subject to § 7 of the Norris-La Guardia Act rather than a strike subject to § 4, is wholly irrelevant. This Court held in the *Chicago River* case that strikes may be enjoined.

And it is equally irrelevant that one case involved a "minor" dispute, while this case (like the *Yardmasters'* case) involves a "major" dispute. The rationale for granting relief against violations of the Railway Labor Act in the course of minor disputes is equally applicable to granting such relief in major disputes (see App. A, pp. 38, 39, 40; and see Pet., pp. 10-11).

IV.

RESPONDENTS' BARGAINING REPRESENTATIVES WERE NOT AUTHORIZED EITHER TO BARGAIN OR TO DECIDE AS REQUIRED BY THE RAILWAY LABOR ACT.

At page 24 of their brief, respondents admit, as they must, that the Railway Labor Act requires that the parties to a labor dispute shall appoint representatives for bargaining who "shall be authorized 'to confer,' 'to consider,' and 'if possible' decide disputes." They attempt, however, to avoid the force of this admission by asserting that the requirements of the Act were met because their representatives were "authorized by the Union's governing law to confer, consider, and decide the dispute between the Union and the carriers by making a settlement or agreement subject only to the condition that any settlement or agreement

be ratified by the Union membership" (Resp. Br., pp. 24-25). This is a mere play on words.

In point of fact, respondents' negotiators had no authority to make any agreement other than to enforce their original demands (S.A. 60-61, 140, 158; and see S.A. 132). They had no authority to accept the arbitration proffered by the National Mediation Board or to accept the recommendation of a Presidential Emergency Board (S.A. 61). They didn't even have any way of securing authority to propose a compromise to the railroad negotiators (S.A. 127; Pet., p. 23).

The only "conferring" these negotiators could do was mere talking; the only "consideration" they could give was purely personal; and the only "decision" they could make was whether or not to permit the members to have a chance to decide for themselves (S.A. 126, 129, 156). The "condition" imposed on their authorization—that every decision be ratified by vote of the membership—effectively deprived them of all authority to carry out the mandatory duties imposed by the Railway Labor Act.

Respondents seek to justify their failure to confer adequate authority upon their negotiators by relying on practices which are permissible in industries not covered by the Railway Labor Act, and on an assumed Congressional policy favoring ratification clauses in union agreements (Resp. Br., pp. 23-31). All that Congress did in the Landrum-Griffin Act was require that members be informed of a union's internal rules; it did not prescribe what those rules should be. The Railway Labor Act, by its terms and as it has been construed by the agency which must administer the Act and those who are governed by it, plainly requires that bargaining be conducted through representatives authorized to decide disputes (Pet., pp. 16-22). That command cannot be defeated by inferences based upon irrelevant statutes, procedures, or decisions.

V.

THE DISTRICT COURT PROPERLY FOUND THAT RESPONDENTS FAILED TO BARGAIN IN GOOD FAITH, AND THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN DISREGARDING THAT FINDING.

Respondents contend that petitioners seek to have this Court review the evidence and substitute its judgment of the facts for that of the Court of Appeals (Resp. Br., p. 31). To the contrary, what petitioners seek is to have this Court, as it has so often done in the past, set aside the Court of Appeals' invasion of the fact-finding authority of the *trial court*, and to impose upon the court below a decent regard for findings of fact based on substantial evidence and face-to-face observation of witnesses. Neither this Court nor the court below is the proper trier of fact in this case.

Petitioners have set forth in their petition the basis of the District Court's determination that respondents failed to bargain in good faith and the manner in which the court below ignored the requirements of Rule 52(a) (Pet., pp. 22-27). Respondents answer that

(1) they know of no reason why their membership should have been permitted to decide the question of arbitration (Resp. Br., pp. 31-32);

(2) their negotiators did make counterproposals (Resp. Br., p. 31); and

(3) Mr. Speirs "assured the carriers" that if they offered a 3 per cent increase or the 2 per cent pattern settlement plus fringe benefits, e.g., improved vacations, "he could get membership ratification", but that the railroads refused to go beyond their July 20 offer which had already been rejected (Resp. Br., pp. 9, 32).

As to the first point, it is obvious that where the authority to decide is vested in the membership, and not the negoti-

ators, good faith bargaining requires that such questions be submitted to those empowered to act. *Producers Produce Co. and Amalgamated Meat Cutters Union*, 23 NLRB 876 (1940).

As to the second, the testimony of witnesses appearing personally before the District Court was in conflict, and the District Court found that the union's representatives made no counterproposals (Pet., p. 25; S.A. 167).

And, as to the third, Mr. Speirs made no "assurances" of any kind to the railroads except in his capacity as a witness in this proceeding, testifying in opposition to the entry of an injunction (S.A. 125). Furthermore, as respondents know full well, and as the court below was informed, at the time the injunction was entered the railroads offered the 2 per cent pattern settlement, plus improved vacations, to the SUNA membership. Although this offer was accepted by the majority of the employees represented by SUNA on 13 of the 17 petitioning railroads, it did not become effective as the basis of a settlement of this dispute because the SUNA constitution requires approval by a majority of all of SUNA's members.

CONCLUSION

The questions presented by the decision below are those set forth in the petition. For the reasons stated in the petition, a writ of certiorari should issue to review those questions and the decision below.

Respectfully submitted,

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